2

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

H. A. & L. D. HOLLAND COMPANY, a Corporation,
Appellant,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellee.

GEORGE TURNER and BERTHA TURNER, Husband and Wife,
Appellants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellee.

H. J. SHINN and PHOEBE SHINN, Husband and Wife,
Appellants,
vs.
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W. H. KIERNAN and CHRISTINE B. KIERNAN, Husband and Wife,
Appellants,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellee.

No. 2332

REPLY BRIEF OF APPELLANTS.

Upon appeals from the United States District Court for the Eastern District of Washington, Northern Division.

TURNER & GERAGHTY,
POST, AVERY & HIGGINS.
Solicitors for Appellants.
Spokane, Washington.

McKee Printing Co., Spokane, Wash.

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REPLY BRIEF OF APPELLANTS.

FIRST

Was Railroad Street, in Fact, Carved Out of the Right of Way of the Railroad Company?

The argument of respondent on the above question is amusing if nothing more. Light and airy persiflage may be resorted to, no doubt, in a legal

brief, to puncture an argumentative bubble; but when the bubble has been thus pricked and burst, what is the use of bringing a ten-inch rifled cannon to bear on the wet spot and bombarding it with shot and shell? That is what our friends of the other side have done, metaphorically speaking, in the twenty-seven pages of their brief, devoted to our first proposition, and in doing so they have betrayed an uneasy consciousness that, after all, their shafts of satire have glanced off the despised bubble, leaving it still intact, and a serious obstacle in their path to the ravishment and dismemberment of a beautiful city, and incidentally, to the destruction of valuable private rights.

Let us now look at some of the missiles fired at the supposed bubble, for the purpose of determining whether they are the solid steel shot they purport to be, or mere rotten imitations that shatter with the impact of the powder behind them.

Speaking of the doctrine of merger, counsel for respondent say: "The corner stone of their argument, that the right of way title, passing under the right of way grant, is inferior to the title to the aid lands, passing under the aid grant, is palpably unsound. The right of way title is the prime, the superior title, and if under such conditions as are here present, there is a merging of an inferior in a superior title, the title under the aid grant merges in the title under the right of way grant to the whole right of way." Then, after citing a number of Federal cases to

support its contention, which do not in fact support it, respondent proceeds: "When title vests under the aid grant it is absolute and the grantee may dispose of the granted land as it chooses. The title which vests under the right of way grant is not absolute, and the grantee must retain the granted land for railroad purposes, and may not dispose of it or encumber it without the consent of congress."

The ordinary mind, to which counsel is fond of appealing, will find some difficulty in reconciling these two statements, because to an ordinary mind having some knowledge of the sense in which the terms are used in the law relating to merger, it will at once appear that a legal title that is absolute is superior to one that is not absolute.

Passing then to a consideration of the matter on principle, counsel find an insuperable obstacle to merger in the fact, as claimed, that each of the grants was "independent of and dissociated from the other, as though between two private parties separate tracts of land had been conveyed."

This position betrays a carelessness of fact and a confusion of ideas which we had not expected from our learned friends. It is not true, in the first place, that the grants were independent and dissociated from each other. They were made at the same time and in the same instrument and to effectuate the same end. But if they had been independent and dissociated

grants, we have yet to learn that that would present any obstacle to merger. Indeed it is with reference to that class of grants that merger is most generally declared. Nor is it accurate to assume, as counsel do, that the grants related to separate tracts of land. If they did so relate, then, of course, there could be no merger, because it is impossible to conceive of any situation growing out of grants of separate tracts of land where an inferior and superior title would coincide in the same individual as the result of such grants. The grants here, however, had relation in part to the same tracts of land, that is to say, to all odd sections of public land through which the line of railway might be constructed, and as to which, if not sold, reserved or otherwise disposed of, or pre-empted or homesteaded, at the date of definite location, both the right of way grant and the aid grant would attach.

We next notice the contention that "the right of way grant is of the particular, the aid grant of the general. The first conveys title to a certain definitely ascertained strip of land across the public domain upon which the railroad is or is to be constructed. The second is dependent for its operation on the first," etc.

That anything has ever been said by any court to justify a contention so extraordinary, we respectfully deny. The distinction between the two grants, that the one was without condition and the other conditioned that the lands had not been disposed of at the time of the filing the map of definite location, is well

known to all lawyers, but that the right of way grant was of a "definitely ascertained strip of land across the public domain" is a preposterous statement. Until the filing the map of definite location it was a float and might have been located anywhere along the general route, and was no more definite than the land grant, which equally with the right of way, attained precision by the filing the map of definite location.

We concede that if some one had settled on section 19 prior to the filing the map of definite location, he would have taken his rights thus acquired subject to the right of way of the railroad company. It is not our contention that the right of way grant was confined to even sections. It contemplated that private rights might attach to odd sections that would otherwise come to the railroad company under the aid grant, and therefore was written in general terms so as to cover all sections of the public domain, odd and even, over which the line of railway might be constructed. No settler could intervene and cut it out. But when that had occurred which prevented the intervention of settlement or adverse rights, what the legal status of the title was would be dependent, first, on the principles of law applicable to such a double grant, and, second, on the presence or absence of a policy underlying the grants, which might control and modify their legal effect. Both of these considerations were discussed in our principal brief, and we need not advert to them further.

We next notice the position of respondent that the "aid grant is a bonus given as an inducement for the acceptance and use of the right of way," and say that that fact, if true, would not militate against the operation of the law of merger as claimed by us. But the distinction thus taken between the two grants does not appear to be sound. Both were aid grants and neither was a consideration for the other.

Railroad Co. v. Baldwin, 103 U. S. 430.

Passing now to the argument in respondent's brief made, as claimed, from the standpoint of reasonableness, we find it based on deductions drawn from the decisions in the Smith and Townsend cases that "by granting a right of way four hundred feet in width, congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." It is to be noted that those decisions were made as against individuals striving to maintain a status in the right of way under statutes of limitation or by virtue of the doctrine of estoppel. Manifestly, in such cases, the determination of congress was binding on the courts, and there was no room for any other declaration. But to deduce from those decisions some grave, well defined general policy of congress in the direction of an extraordinarily wide right of way is to expand them beyond anything intended by the courts and to fly in the face of the fact that congress consented to any right of way not less than fifty feet in width, where the right of way was purchased from private persons or acquired

by condemnation proceedings. If congress had contemplated the necessity of a four hundred foot right of way, as an aid to national policy, it would have required it throughout and from end to end. Now all that can be said, in view of the decisions in the Smith and Townsend cases is, that as to lands coming to the railroad company under the right of way grant, the right of way, as against private persons, must be maintained of the width of four hundred feet. Respondent attempts to deduce the further consequence, that a four hundred foot right of way throughout was a national policy, which policy must have its effect in determining whether a particular parcel of land came to the company under the right of way grant or under the aid grant. To our minds, which are ordinary in the ordinary sense, and not in the extraordinary sense of the minds of counsel for respondent, the added deductions are a little strained and not fairly to be maintained from the standpoint of mere reasonableness.

When counsel for respondent come to consider the propositions of complainants that the aid grant was the first to attach, and that it was not displaced by the right of way grant when the road was finally constructed, they are more than ordinarily facetious. The ordinary mind is again nonplussed at the intellectual feat which can find priority for the aid grant when "the aid grant is fixed with reference to the route of said line of railway." This is called raising a stream higher than its source. And again it is said that the

ordinary mind cannot comprehend "how that which is without precision, definiteness or certainty, a 'float' which may settle anywhere or merely continue to float, can be the measure for and de-limit that which is precise, definite and certain."

We must, in compliment to counsel, attribute these brilliant flashes of wit to a willful misunderstanding of our position and of the legal principles involved, since any other view would derogate from that intellectual superiority which they assume and which we know they possess. Counsel, after their exhaustive review of the cases relating to aid grants, must have been aware that the aid grant was not fixed with reference to the "route of the line of railway." It was fixed with reference to the line laid down on the map of definite location, which may or may not coincide with the "route" actually followed. Why the limits and the accruing of the land grant were made to depend on that record act, rather than on the actual route of the road, is told by Mr. Justice Brewer in Tarpey v. Madsen, 178 U. S. 226, a case which counsel have cited in their brief. Now how that record, on file in the archives of the nation, can be properly termed "a float which may settle anywhere or merely continue to float" we confess our inability to understand, and must, as counsel for respondents have so frequently done, take refuge behind the limitations of an ordinary mind.

With reason tottering as the result of our assaults upon it, counsel for respondent next turn to what they call our onslaught on authority. We said in our brief that the line of definite location laid down on the map was only approximate and might be departed from in the actual construction of the road and that only the government could complain, and as a deduction we argued that since the map of definite location did not actually fix the line upon which the road was to be built, but did fix it for the purposes of the accruing of the title to the granted lands, that as to odd sections coming to the company under the land grant, the land grant title was the first to attach, and left nothing for the right of way grant to attach to when the road was finally constructed. It is the premise to this argument that respondent denounces as an assault on authority. We were speaking, of course, with respect to a change of location which did not trench on private right, and which involved at the time it was made only the railroad company and the government. If the premise be correct the deduction drawn from it appear to us to be sound, provided of course, and always, as conceded in our main brief, that no policy be found in the granting act to which such a line of reasoning would run counter. As full and perfect authority for the premise, we have presented, among other authorities, and do now present, the case of N. P. R. Co. v. Smith, 171 U. S. 260. In that case the railroad company had made and filed its map of definite location, and several years thereafter when it constructed its road it departed from the line

of its map and constructed over an even section two miles north of the line of definite location. The court held the title to the right of way thus acquired superior to that of private individuals claiming under a townsite location initiated but not perfected before the actual building of the road, saying:

> "But suppose it be conceded, for the sake of the argument, that the Lake Superior and Puget Sound Land Company made the first entry, and that the city of Bismarck and Smith its grantee could avail themselves of such entry, still the proof is that the railroad completed its road over the land before the townsite was patented, and before Smith obtained his conveyance. To acquire the benefit tendered by the Act of 1864 nothing more was necessary than for the road to be constructed. The railroad company by accepting the offer of the government obtained a grant of the right of way, which was at least perfectly good as against the government."

The position thus definitely stated, is the necessary corollary of many other decisions by the same court, some of which we have cited, and is inferentially sustained by one of the cases upon which respondent relies with so much confidence to establish a contrary doctrine, namely, Missouri etc. Co. v. Cook, 163 U. S. 491. That case merely held that the beneficial easement of the right of way grant acquires precision and becomes fixed in favor of individuals acquiring title to the pubilc domain upon the filing of the map of definite location—that is to say, that as to such individuals, if the railroad wants to make a second location, it must do so subject to prior rights acquired by them.

The reservation at the end of the opinion shows that the court had in mind the question of the right of the railroad company as between itself and the government, to change its location, and intended to guard its opinion against a construction adverse to the railroad company on that question.

As to the case of Northern Pacific Railway Company v. Murray, 87 Federal R. 648, decided by this court, it went no further and decided no question other than that decided by the Supreme Court in Missouri etc. Co. v. Cook. It made no reservation similar to that made in the Cook case, but the *ratio decidendi* must be looked at in the light of the case actually before the court.

The concluding part of respondent's argument on our first proposition is a melange in which misconception of the nature of the doctrine of merger and of the relation of legal titles to each other necessary to call it into play, is mingled with caustic comment on the elementary character of the learning cited by us in support of our position. This melange induces two reflections which we throw out for what they are worth. One is that it would be well for our friends on the other side to give more attention than they have given, or are apparently disposed to give, to the elementary works. The other is that it is better to go to the horn books for horn book law, than to clutter up the pages of a legal brief with an undigested mass of hit or miss authorities collected from digests and text books.

We believe that our contentions on the question at issue, though vigorously and speciously assailed, have not been overturned by the argument of respondent. We restate them briefly:

FIRST: The title under the aid grant was the first to attain precision, and is therefore the title to be considered in determining the validity of the dedication of Railroad Street.

SECOND: If both the aid grant and the right of way grant attained precision at the same time, the latter was an inferior title and became merged in the superior title conferred by the grant in aid.

THIRD: There is and was no national policy, evidenced by the granting act, or otherwise, which stands in the way of the first and second contentions if they be well taken in law.

SECOND

But If the Railroad Company Took Title Under the Right of Way Grant, Did It Have the Power to Dedicate a Part of Its Right of Way as a Public Street?

We are indebted to respondent for the insertion in its brief of the statutes of the state relating to the control of municipalities over their streets, and for the

citation of many interesting decisions relating to the same, but neither those statutes nor the decisions thereon, really affect the question of power here under consideration. A new factor appears in the case at bar, and that is the Act of Congress under which the railway company maintains its status in Railroad Street,—that is to say, if Railroad Street was carved out of the railroad right of way.

The opinion of this court in the case of the cross streets when that case was before it twenty years ago, answers every one of the suggestions of counsel as to the untoward results which might ensue if Railroad Street be declared to be a street and subject to the police power of the city of Spokane. This court said in that opinion:

> "Of course, the railroad company could confer upon the public no greater estate than it possessed, and, in any view of the case, the dedication could not affect the reserved rights of the United States, whatever they might be. The public easement, so dedicated, is undoubtedly subservient to the exigencies of railroad use, and the public take the dedicated crossing subject to the inconvenience which may result from the increase of traffic and transportation along the line of the road and the possible necessity of laying more tracks thereupon; but the company after such dedication, and after rights have been acquired thereunder, may not close up the street with a building, and may not say, as in this case, that because it is convenient to have a warehouse at this point, and because there is no place in the city so desirable for that purpose, it will revoke

the rights which it has conferred upon the public by the dedication."

N. P. R. Co. v. City of Spokane, 64 Fed. R. 509.

In that case all the direful consequences to ensue from having an established street in the right of way were pressed on the court with as much force as in this case, and all the consequences deduced from the power of the city over a longitudinal street can as well be urged against the establishment and maintenance of a cross street; but the argument did not impress the court then, and it has no more force now than then.

Congress granted the railroad right of way for national purposes and pursuant to ample national power, and therefore the extent to which the use of the right of way may be limited is not wholly dependent on local statutes or local policy, but is to be measured primarily by the national will. We say primarily, because the Supreme Court in the Townsend case said that such rights of way were amenable to the police power of the states. We assume, however, that neither under the police power, nor under the power conferred on the city to regulate its streets, if there be any differenc between the two, could the state disable the railroad company in the beneficial use of its right of way. It is true that the city has power to vacate all streets within its limits, but if it should undertake to exercise that power with reference to Railroad Street, neither the fee nor the beneficial use would vest in the abutting owners, because that

would be to allow a local law to overcome and destroy a national purpose. In case of such vacation the result would be, we believe, that the rights both of the railway company and the abutting owners would remain precisely the same that they are today, namely, the right to a joint and common use, to be enjoyed by each with due subordination to the rights of the other. Under the municipal law vacation would not destroy the right of the abutting owners to access and light and air unless compensation were made for those rights. Under the Federal law it would not deprive the railroad company of its right of way privileges because having been granted by the nation they could not be taken away by the state.

But as stated by the Supreme Court in the Townsend case, the right of way of the railroad company is amenable to the police power of the state. The pretence made in this case that the railway company is proceeding to raise its tracks on its own right of way under the compulsion of a mandatory ordinance of the city of Spokane, is an admission by respondent of that power and of its extent. If, instead of requiring the raising of its tracks, the city had said to the railway company that it must cease to make the heart of Spokane its switching yard, and must maintain only such tracks there as were necessary for the passage of through trains, it would have been an equally valid exercise of police power. If that had been the order and it had been complied with, Railroad Street on each side of the tracks would now be as available for travel longitudinally as much so as it was during the

first ten years of its establishment, and the awful congestion that respondent has pictured on the right of way as the result of the maintenance of Railroad Street, and the consequent danger to life and property, would be a picture only. Why could not the railroad company contract with the city in advance that it would not introduce such a condition, if having created the condition it may now be required to abate it? And if such a condition arises as the result of the establishment of Railroad Street, because of the incompatibility of the street with the extraordinary use it wants to make of its right of way in the heart of the city, why could it not validly contract against such use by consenting in the beginning to the establishment of Railroad Street? These considerations go far to mitigate the sacro-sanct character of respondent's right of way, and exhibit the emptiness of the long disquisition, based on the awful consequences to ensue from impairing the sacred right of the railroad company and letting the public share therein, with which respondent assails the intelligence of the court to induce its consent to a breach of solemn contract and an act of bad faith.

In speaking of the supposed incompatibility of the street with the right of way, counsel for respondent make this prefervid declaration: "It needs no evidence, it needs no authority, to establish that the one is utterly incompatible with the other. One or the other must give way, for a transcontinental railroad

handling the enormous traffic which the Northern Pacific Railway does, manifestly cannot operate its road in the center of a city street, along which as well as across which the city's street traffic continually flows." Yet the enormous traffic of which counsel speaks is hauled over a single line of track for more than two thousand miles. It is not the enormous traffic hauled by the railway company which embarrasses that company in connection with Railroad Street. It is the fact that it has thus far been successful in the larceny of Railroad Street in order that it might turn it into a switching yard, thus making it a public nuisance which it ought not to be permitted to maintain, street or no street. Of course the respondent must have a switching yard and ample warehouse facilities somewhere in the city or its environs. But those facilities may be provided anywhere along its line, east or west of Railroad Street, without invading the very centre and heart of the city, and setting up a condition which enables it to dilate on the incompatibility of that condition with the maintenance of its solemn obligations. So far as its transcontinental traffic is concerned, as well as its local traffic in Spokane, both may be well and conveniently carried on without the destruction or impairment of the rights of the public in Railroad Street. The contention that there is any incompatibility between the street and the right of way is the sheerest fustian and nonsense.

We next notice the argument of respondent that there is no warrant for the distinction taken in the brief of complainants between a public and private use of the Northern Pacific right of way. It asks, "Where, pray, is there in the Northern Pacific grant any word of discrimination between private right and public right?" We answer, there is none except that which is necessarily implied. That the discrimination is there however by necessary implication, we have on the authority of this court in N. P. Ry. Co. v. City of Spokane, and on the authority of the Supreme Court in the Townsend case and the Ely case. The distinction is not ours as counsel seem to think. It is not only implied by the care with which the courts limit the effect of their decisions to alienations in favor of individuals, but it is expressly declared in all of them. Thus in N. P. Ry. Co. v. City of Spokane, it was said:

> "Whether the company acquired the fee to the lands covered by its right of way or not, no reason is apparent why it may not dedicate *public* easements over and across the same."

And again: That it

> "might not cede to the *public* rights and easements so extensive or of such a nature as to interfere with its duties to regularly and properly operate a railroad."

And in the Townsend case it was said:

> "Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would

> become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

In view of these expressions, counsel are really criticising the courts and not us, when they say: "To say that one act is forbidden and the other not because the right in one case is private and in the other public, is not to deal with the matter sensibly."

Counsel for respondent are alarmed at the consequences that would flow from the maintenance of the dedication of Railroad Street. They see in fancy a highway stretching across Washington from Spokane to Seattle, indeed from the Great Lakes to Puget Sound, laid out on the right of way of their client, and dedicated by it, receiving the benefits of the easy grades, the tunnels through the mountains and the bridges across the large rivers. Well, considering the fact that their client occupies a right of way four hundred feet wide with a single track, between the points named, the suggestion seems rather feasible to us, and does not frighten us in the least. But in view of the trepidition of counsel we feel called on to re-assure them; we have noticed no signs of an enlargement of the heart which might induce their client to become a public benefactor by making the dreaded dedication. As for the further fear expressed that the state or the nation might at some time lay out a high-

way on unused parts of the right of way, we have their assurance in other parts of their brief that that sacred ground is taboo, and beyond the power of the public to condemn for street or highway purposes.

We have no quarrel with the numerous state cases cited and quoted from by respondent in which it was held that cities had no power to condemn parts of railroad rights of way for street purposes. It would be tedious to examine those cases in detail and point out the extent to which each was influenced by considerations that have a bearing on the point under consideration, namely, the limitation imposed by the Act of Congress on the railroad company in dealing with its right of way. It is doubtful if the pleadings in this case can be construed as raising the issue of *ultra vires* generally, but if they can be so construed the decision of Mr. Justice Brewer in the Circuit Court and of the Supreme Court on appeal, in the case of Union Pacific Railway Co. v. Chicago etc. Ry. Co., 47 Federal R. 16, 163 U. S. 564, authoritatively answers all the cases referred to by respondent. Mr. Justice Brewer said in that case: "It (the Railroad Company) may do all the business which is offered, and still have a surplus use of its tracks. Can it be that its obligation to the government or the public compels it to let that surplus lie idle?" And again: "I think it may be laid down as a general proposition that a corporation, which, in the discharge of the duties imposed on it by charter, acquires property which it must have for its own uses, may, if there be a sur-

plus of such property, make a contract for the disposition of such surplus use in any manner not inconsistent with the purposes of its creation." In this connection we again quote a part of Judge Brewer's remarks with respect to the defense of *ultra vires* by corporations: "It is not seemly for a corporation, any more than for an individual, to make a contract and then break it,—to abide by it so long as it is advantageous and repudiate it when it becomes onerous. The courts may well say to such corporation: 'As you have called it a contract we will do the same. As you have enjoyed the benefits, when it was beneficial, you must bear the burdens when it becomes onerous, unless it clearly appears that that which you have assumed to do is clearly beyond your powers.'"

In connection with its *ultra vires* argument, respondent insists that the power of the company to dedicate the street cannot be influenced by conditions as they existed in 1881, at the time of the dedication. That may or may not be true when considering the limitations of the Act of Congress, but it is not true when considering the power of the company under the general doctrine of *ultra vires.* Whether at the time it made its dedication it had a surplus which it might devote to a public use without impairing its ability to perform its charter obligations, is, according to Justice Brewer, the very measure of its corporate power in the matter of the dedication.

Still pursuing its assault on the dedication on the ground that it was *ultra vires,* respondent, having worked out to its own satisfaction that there was no power under the laws of Washington to condemn any part of the right of way for a street, is called on by the necessities of its case to insist that the power to dedicate is measured by the power to condemn, and this it does valiantly, if somewhat speciously. It can find no authority for its contention either in the despised text books or in the much prized cyclopedias. The nearest approach to decided cases bearing on the proposition, found by respondent, are those cited in the cyclopedias to the general proposition that a railway company cannot dispose of or use its right of way so as to destroy or impair its ability to serve the public, a limitation which we have insisted on from the beginning as the only limitation that governed the railroad company in the making of its dedication.

So far as its argument on reason goes it seems a sufficient answer to say that the power to dedicate might well be considered the measure of the power to condemn, but that the considerations governing dedication and condemnation are so essentially different, that the power to condemn cannot be made the measure of the power to dedicate. For instance, the very authorities cited by respondent present no other limitation on the power to dedicate parts of rights of way than that the dedication must not destroy or impair the ability of the railway to serve the public. The authorities on the other hand, presented by re-

spondent with reference to the power to condemn railway rights of way, deny the power in any case or to any extent.

Complainants, on the other hand, are not without authority to the proposition that railway companies may dedicate streets out of parts of their right of way, and those authorities are cited on page 34 of the principal brief,—to which we now add the much cited case of N. P. Ry. Co. vs. City of Spokane, decided by this court. The court in that case not only upheld the dedication of Railroad Street as consistent with the purpose of Congress in making the grant of the right of way, but also as consistent with the general charter powers of the railroad company. After noticing and distinguishing state cases cited as opposed, on the ground that a diversion of any part of the right of way was contrary to the charter powers of railway corporations, the court concludes its opinion in these words:

> "This is far from holding that a railroad company may not, in recognition of public interests, and for the promotion of the public welfare, dedicate to the public an easement over its right of way which does not interfere with its own use of the same for a railroad."

Finally, on this branch of the case, respondent calls the dedication in question a mere paper dedication, assimilates the action brought by complainants to one for specific performance, and cites authorities to the proposition that the courts will not give their

aid to the specific performance of contracts that are unconscionable, oppressive or iniquitous. We shall not notice this threefold contention at any length.

As to whether or not the dedication was a mere paper dedication, never acted on by the dedicator and the public, we cite the court to the testimony on the subject of Railroad Street and the use made of it by the public for nearly ten years, found in the record, and quoted from in our principal brief.

On the proposition that the action is one for specific performance, we say that it is one to enjoin the obstruction of a street, and that it sounds in tort rather than in contract, because it is founded on the jurisdiction of Courts of Equity to enjoin the construction and maintenance of nuisances.

On the last branch of the proposition it is only necessary to recall a few facts to show that it is the defense here that is unconscionable and iniquitous and not complainant's case. After dedicating Railroad Street, selling the lots on it on the strength of the fact that it was a street, watching and encouraging its growth as a street for ten years, seeing it built on on both sides by its grantees with improvements costing many millions of dollars, the Railway Company now comes into court and presents the twofold defense against legal proceedings to prevent its aggressions, that it took the money of its grantees under false pretenses, and that since the supine conduct of the public authorities enabled it to steal one-half the street, it ought now to be permitted to steal the other half.

THIRD

Did the Railroad Company, in and by the Town Plat Filed by It, In Fact and in Law, Make a Statutory Dedication of Railroad Street?

Respondent sets out the statutes of Washington Territory (1881) governing the platting of townsites, and deduces therefrom that no writing on town plats in the nature of a formal dedication was necessary or called for by those statutes. It says therefore, that "the writing upon the plat of Railroad Addition added nothing to the effect of the plat itself, so far as the dedication of the streets shown thereon is concerned." If the deduction thus drawn from the statutes be correct, and we are not disposed to question it, although we thought it sufficiently questionable in the outset to omit it from our argument, then we say the deduction does not go far enough. The writing on the plat added nothing to it for any purpose. It was so much waste paper. If the plat itself is the thing and the writing nothing, the writing might as well not be there at all. The only way a townsite proprietor could protect himself under the townsite laws, would be to be very careful that he marked nothing on his plat as a street, alley, park, or other public convenience, that he did not intend to dedicate to that purpose. And if, as respondent insists, the legal staff of the railroad company must have been familiar with the law, and therefore made the written

reservation found on the plat to avoid its effect, it argues great recklessness of the interests of their client and very little comprehension of means to ends, to base protection on a confused writing, not called for or recognized by the law, instead of erasing the words "Railroad Street" from the map and inserting in lieu thereof the words "Railroad Reserve."

Respondent does not very clearly press home any deduction from these statutes except to say that "under the conditions appearing here and the rules of law governing such cases, no doubt can be entertained as to the purpose of this writing," meaning thereby, we presume, that its purpose was to create an exception rather than a reservation. But why is such purpose so evident? If, notwithstanding that the law contemplated no writing, it was still thought a writing would have some force and effect, and that the interests of the railroad required that its right of way be protected by such a writing, what is there in those facts that points so conclusively to the intention of the railroad company to protect its interests by an exception rather than a reservation? The argument of respondent on the point seems to us a complete *non sequitur,* and to leave the matter exactly where it was before, neither advancing nor retarding a determination one way or the other.

We next notice the contention of respondent that the railroad had been completed through Spokane before the making and filing the town plat. The fact

is not very material in the construction of the writing on the town plat, but as opposed to the recollection of Mr. Simonson, who is not and never has been a resident of Spokane, we oppose the testimony of Dr. J. E. Gandy, who said: "Have lived in Spokane since March 19, 1880, a little over thirty-three years. Northern Pacific was not at that time completed to Spokane; the survey was made but there was no construction here then. The road was constructed through Spokane in 1881, the summer of 1881." Record, p. 219. It is extremely unlikely that the road was completed in advance of the filing the map of definite location, and that occurred, as the document itself shows, on the 4th day of October, 1880.

With reference to the line of authorities set up by respondent to establish that the writing on the town plat must be construed to be an exception rather than a reservation because it is the saving of a right already in existence and not the carving out of a new right, we have little to add to our principal brief, except to say that the same line of authorities was pressed on this court in the case of N. P. Ry. Co. v. City of Spokane, and that the point was then disposed of in these words: "It is contended that the words of reservation concerning Railroad Street operate to except from the dedication all the land contained within the north and south lines of that street, and to cut in twain the streets which upon the plat are indicated as crossing the same. It is obvious that the plat and the words of dedication are to be construed together in

arriving at the intention of the dedicator. With this rule of construction in view, *it is clear that Railroad Street is reserved from dedication to public use, so far as it is necessary to be retained for the tracks and uses of said railroad company,* but that at the same time, and co-existent with the reservation, the company has granted by its dedication to the public the easement to cross its tracks and right of way at certain fixed and designated points." This language, it is true, was used with respect to the cross streets, because those streets were the only ones then in controversy, but it is difficult to see how the same identical writing can be construed as a reservation for the purposes of the cross streets and as an exception for the longitudinal street. And it will not do to say that the court was speaking loosely, and without having the distinction between exceptions and reservations clearly in mind, because it was to that distinction, pressed on it with force and earnestness, that the court was directing its remarks.

We will hazard one other thought pertinent to the point pressed on the court by the respondent and then pass on. The cases it presents have no point unless the right of way of the railroad company be itself an easement. It speaks of it as right of way throughout its brief, thus giving it character as a mere easement, and with the evident purpose that it shall be so understood. But it is not so at all. In the language of the Townsend case the grant of the right of way was "in effect the grant of a limited fee." In dealing with that fee and utilizing it in part, as it might do,

for another public purpose, the reservation answers all the tests of the rule laid down by respondent.

Complainants assent unreservedly to the proposition that "an intention to dedicate will not be presumed, but must clearly appear." If, upon all the facts of this case, the intention to dedicate Railroad Street does not clearly appear, then, of course, complainants have failed in their contention. But the principle has little, if any, application in the connection urged by respondent. The writing on the plat must be construed in the light of certain principles and in connection with all the facts, and in doing that, the court is not to be restrained or aided in giving the proper construction by unfavorable intendments or the reverse.

In this connection respondent insists that the writing on the plat is so clear and unequivocal as to forbid the resort to anything else to determine the intent of the dedicator. But this court did not think so when the plat was under consideration before. It then said that the plat and the dedicatory words must be construed together. More than that, it considered and gave effect to the use of the streets by the public, to the acquiescence by the railroad company in such use, to the sale of lots fronting on Railroad Street and having no other means of access than Railroad Street, and to the agreement between General Sprague and Mr. Browne about the laying out and dedidication of Railroad Street. And the court was right in doing

so. Even if the dedicatory language was clear, which we deny, it is opposed with an equally clear designation on the plat of Railroad Street as a street. Does not this create an ambiguity which makes extraneous evidence admissible? Especially in view of the fact, as brought out by respondent, that it is the plat alone that counts under the statutes in force at the time the town plat was made?

Complainants did not, as respondent suggests, introduce evidence tending to establish that the plat of Railroad Addition was a standard form adopted by the railroad company. They introduced evidence showing that a Railroad Street was shown on the town plat of three other towns on the line of the railroad west of Spokane within the railroad right of way, and that the dedicatory language on those plats was identical with that on the plat of Railroad Addition to Spokane Falls, and that all four of the plats were acknowledged on the same day. They also introduced evidence showing that those streets have been maintained as streets to this day in the other towns, and that in some of them Railroad Street was the principal street of the town. That four town plats of paper towns, made and acknowledged by the same dedicator on the same day, should be in the same form in every respect, is not remarkable, and that fact alone would not aid in giving them and the writing thereon any particular construction. That out of the four, the Railroad Streets of three of them have been maintained to this day, is, however, a strong and cogent

fact, in connection with the other facts, to show that the Railroad Street of Spokane was in fact intended to be a street, and that that intention would never have been questioned but for the unexpected growth of Spokane into a city of exceptional importance. The cogency of the facts thus shown cannot be weakened by the suggestion that the town plats of the railroad company had been standardized. That is a pure figment of the imagination.

With the cases from the state of Washington and from other states, cited and quoted from by respondent, on the subject of dedication, and in which an absence of intent to dedicate was found, we take no issue. It would have been remarkable, on the facts of those cases, if the necessary intent had been found. In none of them was the alleged street called a street on the plat, nor were there any facts raising the necessary implication that it was intended to be a street. In several of them the designation on the plat of the parcel of land claimed to have been dedicated was such as to show an affirmative purpose not to dedicate.

In Provident Trust Co. v. Spokane, 63 Wash. 92, the strip of land twenty feet wide claimed to have been dedicated lay between two platted streets, Hill Street and North Street, but was separated from them on the plat by a line drawn the entire length of the strip. The strip had on it at the time of dedication a street railway and was marked on the plat with the letters "R. R." There was nothing in the case but

the town plat, and it is difficult to understand how the court could have reached any conclusion other than that there was no intention shown to dedicate the strip as a street.

In the case of Baker v. Vanderburg (Mo.), 12 S. W. 462, the plat in question showed a block of ground surrounded by streets, and upon the block was written: "This Park is reserved from public use and title kept in proprietors."

In Lever vs. Grant, 102 N. W. 848, the strip of land in controversy was marked on the plat "private way," and this private way was expressly excepted from dedication by the writing on the plat. True it is that that writing called the strip of land the "north thirty feet of Custer Avenue," but the court declined to accept that language as descriptive of the strip and as overruling the marking on the map designating it as a private way. We might very well claim that this last case, so far as it touches the present case at all, is an authority in our favor, but as matter of fact it, like the other cases, merely illustrates the very reasonable principle that a dedication will not be presumed but must be affirmatively established. We do not fear that principle.

There is, however, another principle, to which we adverted in our principal brief, that has an important and controlling influence in the construction of town plats having the features of that under consideration—that is to say, plats which

have writings on them that might be construed in a way to contradict the markings on the plat itself. Town plats are in the nature of deeds to the public and must be so construed. In such deeds every intendment is against the grantor. Ambiguous expressions and contradictory clauses must be construed against him and in favor of the public. Said the Supreme Court of Illinois in such a case:

> "When a deed is so drawn that some will read it one way and some another, it is a well established rule that that meaning shall be adopted which is adverse to the interests of the grantor. In Cruise's Digest, title 32, Deed, chapter 19, section 13, the rule is thus stated: 'A deed is always construed most strongly against the grantor, *verba chartarum fortuis accipiunter contra proferentem; et quaelibet concessio fortissime contra donatorem interpretanda est.* For the principle of self-interest will make men sufficiently careful not to prejudice themselves by using words of too extensive a meaning. And all manner of deceit is hereby avoided in deeds; for people would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them.' If there be ambiguity in this deed, in no case could this rule apply with more reason or justice. Here the parties have made their deeds and spread them upon the records of the county for the inspection of the public, whereby they have made certain dedications, the object and effect of which was to invite purchasers and improvements, and to enhance the value of the residue of the town property. In that way they expected to be remunerated for the dedications thus made, and every man who purchased a lot of them, or made improvements there, paid a proportion of the consideration, for the property donated to the public. To say the least of it, these deeds were so drawn as to induce a large propor-

> tion of purchasers to believe that the premises in controversy were dedicated, and thus they have received a consideration from the public for this very land, and to allow them now to say that they did not intend to include it, is to allow them to practice a palpable fraud upon the public, and to take advantage of their own wrong. This the plainest dictates of common honesty forbid. The law will not allow them to affect ambiguous expressions, and then permit them to put their own construction upon them. Here the words are emphatically their own, for the grantees—the public—were not there to dictate or suggest, and certainly the principle of self-interest was sufficient to make them 'careful not to prejudice themselves by using words of too extensive a meaning.'"
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> *City of Alton v. Ill. Transp. Co.*, 12 Ill. 37.

The Supreme Court of Florida had occasion to consider a case on all fours with the case at bar, and in its determination applied the principle to which we have referred. In that case there had been a town plat with a block of ground delineated on the plat and marked "Park." The writing on the plat, after making certain reservations, continued as follows: "also reserving that certain strip of land which lies on the easterly side of Biscayne Bay drive," etc., the block marked on the plat as a park being a part of the strip of land lying on the easterly side of the Biscayne Bay drive. The court properly treated the attempted reservation as an exception, but declined to give effect to it, saying:

> "What, then, is the proper construction of the plat with respect to the strip of land lying between Biscayne Drive and the bay, and the water rights appurtenant thereto? Only that portion

of the strip extending from a point opposite the center of Third Street is designated as a park on the plat, but that portion is plainly marked in large letters 'Park.' We have shown that the marking of the parcel in this manner indicates that the parcel was dedicated for a public park. The dedicatory statement purports to reserve the entire strip. There is consequently an apparent inconsistency between the different parts of the plat. How, then, should it be construed? The plat is a written instrument, and, like all other documents, must be construed as a whole, in order that the intention of the parties may be ascertained, and every part of the instrument be given effect. City of Noblesville v. Lake Erie & W. R. Co., 130 Ind. 1, 29 N. E. 484. If the document is ambiguous, the construction must be against the dedicator and in favor of the public. Elliott on Roads & Streets (2nd Ed.), Sec. 119."

Then, after quoting at some length from Alton v. Illinois Transp. Co., *supra,* the court proceeds:

"If by reason of the words 'also reserving,' used in this clause, we should construe the reservation to be similar to the reservation in the preceding clause with respect to streets, as contended by appellees, then the reservation would include simply the reversion when the park should be discontinued by law, and this reversion would be secured, not to dedicators, but to persons owning lands abutting or adjoining the strip so dedicated as a park. No person would own lands abutting or adjoining the park to whom the reversion could be made applicable. Lots west of the strip abut upon Biscayne Drive, a public street, and not upon the park. No lots lie east, simply the bay. A construction which would secure the reversion in the property alleged to be a park to the owners of lots abutting Biscayne Drive, on the theory that those persons own lots abutting or adjoining

the park property, will not only obviously violate the real intention of the dedicators, but strain the language used beyond the most liberal interpretation. Neither can we interpret the instrument as meaning that the dedicators reserved the entire strip for a private park. There is nothing to indicate that the word 'park' was intended to have such a meaning. There is no intimation anywhere upon the plat that the parcel marked 'Park' was to be reserved as a private park. * * *"

"Nor can we accept as sound the suggestion of appellant that the reservation clause shows clearly an intent to reserve from dedication the entire strip of land between Biscayne Drive and the bay, for to do that we would be compelled to deny any effect whatever to the word 'park,' written upon a portion of the strip, which word, as we have seen, imports a dedication to the public for park purposes. The rules of construction do not authorize us to reject any portion of an instrument as meaningless if that can be avoided, but rather to harmonize and give effect to the whole."

Florida East Coast Ry. Co. v. Worley, 38 Southern 618.

The case is a little remarkable in its similarity to the case at bar, even down to the contention that the city of Miami was an indispensable party to the litigation. The land company sold lots with reference to the plat; very soon after the making of the plat it caused an abstract to be made in which it was claimed that the Park tract was reserved; the company gave leases to many persons of certain portions of the Park; some residents understood that the land was set aside for a public park, others that it was private property; the city atuhorities never exercised any authority or

control over the tract of land, and after the land came into possession of the railway company the city, at the suggestion of the railway company, passed a resolution declining to accept the dedication of the land as a park; it was not returned for taxation for several years but after that was taxed; and finally the railway company had been in possession of it for many years and had erected and maintained its terminals on the land throughout all the time.

We respectfully insist that the principle of these cases is controlling of the persent case. The inconsistency between the plat and the writing on it, if the writing be interpreted as respondent insists, is so great that it is impossible if effect is to be given to the plat as well as the writing, to accept that interpretation. It is the duty of the court, as declared by the Supreme Court of Florida, to "harmonize and give effect to the whole." The interpretation insisted on by complainants does that. It is not an unreasonable interpretation, and it is one that coincides with all the other features of the plat, with the dealings of the parties, and with all the surrounding circumstances.

In conclusion we notice, briefly, the quotation from Judge Rudkin's opinion, contained in respondent's brief, respecting an estoppel against the abutting property owners. We have great respect for Judge Rudkin, but his suggestion that it would be easy to raise an estoppel against the property owners was entirely gratuitous. There was no issue of estoppel

in the case, and Judge Rudkin did not know that the property owners had stood by while permanent and lasting improvements were under way, because the property owners were not called on to repel an estoppel arising from that fact, and did not attempt to do so. The same fact should have restrained counsel for respondent from indulging in the jibes at complainant who happens to be one of the counsel in this case, found throughout respondent's brief. The fact that the entire matter is outside the case justifies complainants in saying that there is on file in the archives of respondent conclusive evidence that the particular complainant named is not estopped on any point in this case by acquiescence, and counsel for respondent ought not to be ignorant of that fact, if, in truth, they are ignorant of it.

Did the conduct of the Railroad Company and the public, in the use of the street for a period of nearly ten years, effectuate a common law dedication of the street to the public?

Respondent on this question draws a fancy picture which can only be sustained by suppressing most of the facts of the case, inventing others, and giving a desingenuous color to the remainder. It first premises that the Railroad Company anticipating that ~~none~~ some of the towns laid out by it would grow into cities, but not knowing which, platted all of them in uniform fashion, laying off Railroad Street in all of them as a kind

of Railroad reserve both for the use of the Railroad and the public, but without any intention to dedicate it to public use, and then proceeds: "During this formative period the strip was used by any person who found it convenient to do so for any desired purpose so long as such use was consistent with all the desired Railroad uses. The semi-public use of such strip continued until it became inconistent with the Railroad use, and then it was by the Railroad Company abrogated. Such use in the communities that did not grow continues down to the present time. In Spokane it continued for a number of years, gradually being decreased as the needs of the Railroad Company increased, and finally being put an end to a number of years ago."

The respondent is here assuming two facts that do not exist as the atmosphere of the picture. First, that the town plat of every town and village through which its line ran was laid off in uniform fashion. There is not only no evidence of that fact, but it is not a fact. Second, that the strip was reserved for railroad tracks and uses, that is to say, reserved in the sense that it was excepted from dedication. We think we have heretofore shown that there was no such exception of the strip in question. But we pass all that by because it is only a part of the atmosphere surrounding the picture.

The picture itself is that of a permissive use of Railroad Street by the people of Spokane, having no characteristics of real street use more than the use of

other open spaces during the early history of the city, and a gradual drawing in and restriction of that use as the necessities of the Railroad Company required until the public had been wholly excluded; and then, having drawn the picture and exhibited it in its every light with the pardonable pride of an artist the respondent declares: "It follows that there was no use here for such a length of time as would fix Railroad Street as a public highway." This is what respondent calls in its brief building up a man of straw to knock it down again. Where in the picture is exhibited the energetic agents of the Railroad Company showing off to the public the lots abutting Railroad Street, and expatiating on the advantages of that thoroughfare as a wide and desirable street? Where does it show General Sprague and Mr. Browne in conference arranging for the dedication of Railroad Street through their respective properties? Where does it show the plat of Railroad Street with no means of access for lots abutting on it unless the street be a street? Where does the picture show the bustle of an energetic, growing community building up the street with wholesale and retail business houses, with hotels and restaurants, saloons, barber shops, blacksmith shops and fruit stores, interspersed here and there with residences, until as one witness expressed it, the street had been built on continuously, although not solidly, throughout its entire length on both sides, and in some of the blocks on the north side had been built up solidly? Where is shown the Railroad Company contemplating

without protest the growth and development of the street for ten years by its upbuilding on lots sold by it, while its busy agents were pounding the public on the back to buy more lots and pay more money for the purpose of putting up more buildings on the street?

All this is excluded, and respondent would have the court look only at the free and easy habits of the people of a new Western town in the matter of locomotion as fixing the character of the use of Railroad Street, and at the corporate greed, which, after the establishment of the Street, has induced the Railroad Company to endeavor to filch it from the public.

In every street controversy, particularly if it goes back for any length of time, some witness or witnesses may be found on each side of every proposition of fact, the result, no doubt, of a hazy recollection spurred to activity by a general desire to have a look in in investigations involving questions of public neighborhood interest. On this question of the user of railroad street, however, respondent could find only three witnesses who would stand with it, the witnesses Cook, Glassgow and Newberry, and even their testimony must be wrenched from its context to give it the color desired by respondent. Respondent did call one other witness to the point but his testimony was disappointing and is not quoted. We refer to the witness Edward C. Miller, who said: "Railroad Street in those days was used on both sides as a thoroughfare, people driving back and forth, going either west or east to the freight depot or passenger depot * * * other people besides those going to the depot could use it if

they wanted to, could go anywhere they wanted to." Record, p. 342.

The little value to be attached to the stray expressions of the three other witnesses called by respondent concerning the nature of the travel on Railroad Street, will be readily seen when all their testimony is read. For instance, the witness Newberry said on cross examination: (Page 315 of Record).

> "I can't recall any hotel on the north side of Railroad Street but the Sprague House. Might have been more. I think there was one west of that, but I am not positive. I can't answer as to the number of saloons. I can't recall what merchandise stores there were on the street. I wouldn't say there were not any. There were some agricultural implement people, something of that kind, before the fire, I recall.
>
> On the south side of the track there were some residences, and one store adjoining where I lived. I can't say as to residences on the north side. You see there was so much of these things wide open and the streets were not graded, and it would be pretty hard to say just where a house was. The only place where there was a graded street at all was Riverside Avenue.
>
> It was a good while ago. I am pretty hazy as to the buildings that were on either side of the track. I was a very busy man in those days, running back and forth across the continent, chasing the railroad and I was paying more attention to other things. They didn't impress themselves on me, that is all."

The witness Cook said on cross-examination: (Pages 317 and 318 of Record).

> "During most of the time before the fire, I lived on my claim, about a mile and a half south

of the track. During that period I did not buy or sell any lots in Railroad Addition; except one on Second Avenue and Post.

I remember the Taylor and Sharkie building. My recollection is that it faced Howard; it may have faced the railroad also. There may have been buildings on the north side of the track between Stevens and Howard, but I don't call to mind any. There may have been some between Howard and Mill, and between Mill and Post, and Post and Lincoln. I think there were buildings between Lincoln and Monroe. I guess those that were built, if they did not face the side streets, had to face the track if they were going to do any business.

My recollection is not distinct about every building and the size of the building and where it stood and how many in a block. I know people could drive parallel with the track, and did drive there for several blocks, within a space of 100 feet of the railroad track—something like that."

As to the incident related by Mr. Cook about being required on one occasion to go from the front of the warehouse to the back to get his freight, dilated on by respondent as an evidence in that early day of a denial of the rights of the public in Railroad Street, it requires an ingenious imagination and a facile pen to give it any such complexion.

The witness Glasgow said on cross-examination: (Pages 320, 321, 322 of Record).

"Before the fire there were some buildings on the track on Railroad Street between Howard and Mill, fronting on Howard. There were some buildings on the north side between Post and Mill Streets, facing the track. I don't remember what

they were. I have no idea of the character of business that was done in them. There were buildings between Post and Lincoln Streets on the north side. I don't know that they faced the track; they might. It seems to me there were some buildings between Lincoln and Monroe, but they didn't face the track as I remember it. * * "They could drive through if they wished from Post Street to Lincoln. I don't think they drove from Lincoln to Monroe, although I don't know. There was a hide and fur depot in there; Behrend built that very early; I think in '82 or 3. I think the Taylor and Sharkie place fronted on Howard Street, but can't swear to that. Looking at this picture I think it faces north (toward the railroad track)." The picture referred to was then offered in evidence as Defendant's Exhibit 30.

The fur depot referred to, was on the north side of the track near Monroe Street. It might have been one or two hundred feet from the track, I can't say."

Now how ridiculous and absurd to catch up a few phrases used by these witnesses concerning the irregular character of the travel in Spokane in early days and the disposition of people to utilize short cuts in going to and fro, put into their mouths generally by counsel, as establishing against the host of witnesses called by Complainant, and against the necessary and controlling inferences to be drawn from the upbuilding of Railroad Street shown by these witnesses and not denied by any witness for the respondent, that Railroad Street was only used by the public intermittently and permissively, and so long as such use was not inconsistent with all the desired railroad uses! It is almost an insult to the intelligence to argue

to any one that the travel on a well defined and well built street, such as Railroad Street is shown to have been for ten years after its establishment, was a permissive use, and was considered either by the Railroad Company or the public a permissive use. And in view of that fact it may seem unnecessary to recapitulate the testimony of complainant's witnesses on this point, but at the risk of seeming tedious, we do so very briefly. We omit everything relating to the character of the buildings on the street, and the nature of the business carried on in them and confine our quotations to the question of the character and extent of the travel on the street.

Dr. J. E. Gandy: "It (Railroad Street) was used as the principal driveway to and from the Passenger Depot from the down town district, which was then on the corner—the business district was then on lower Howard Street from Front Avenue South, a block and a half probably. It was used as much as any street in town, except possibly Howard Street, and possibly Front, that is, talking now of the early history prior to the beginning of 1883 and 1884. It continued to be a used street, much used street, up to the time of the fire, the big fire in August, 1889, August 4th, 1889. That fire swept away everything on Railroad Street east of Lincoln Street. * * Compared with Front and Main Streets, well in the early history Front and Main were much more prominent than Railroad Street, that is, from 1880 up to the next two or three years. But as time went on

Front became less and less used, Railroad more and more used. Up to the time of the fire Front Street had become principally a second class street, while Railroad Street had improved very materially in that five or six years. * * * People did not drive along there (on north side of the track) promiscuously, there was a well defined roadway close to the railroad track, not right close to it, it was between our building and the track"

Record, pp. 220, 221; p. 223; p. 229.

H. J. Shinn: "I have driven over this street a great number of times; it was used universally by the public. * * * They traveled on Railroad Street promiscuously, now on one side (of the track) and now on the other. In travelling along, at times you might be on Railroad Street and at other times on private ground. They generally followed the line of the railroad."

Record, p. 234; p. 236.

Lucius G. Nash: "That street (Railroad) was constantly used from 1881 to the time of the great fire in 1889. It was used by the public as a thoroughfare. * * * I have ridden on it many, many times as a boy. Railroad Street on both sides was used habitually by the public as a street; that is all there is to it."

Record, p. 247; p. 248.

Frank Johnson: "It (Railroad Street) has been used continuously, considerably by the public as a thoroughfare; was even before I built this Depot, because it was a well beaten road at that time. It was

used on both sides of the track, but of course was used more on the north side than the south side. * * * It made a pretty good thoroughfare because there was a great deal of heavy hauling done over those roads at that time. * * * There was nothing to prevent anybody travelling around there pretty near as they pleased. Generally of course the road was naturally more beaten up and down the avenue here (R. R. Street) because it was used more, and consequently a person will go where the roads are broken rather than across the gravel."

Record, p. 251; p. 252; p. 253.

W. S. Norman: "Up to the time of the fire Railroad Street within the limits I have described (Howard to Monroe) had been used as a public thoroughfare by the public generally, and has been used ever since in a confined form—until a few weeks ago there was a roadway about sixty or eighty feet wide, between the service track to the warehouses and the main track."

Record, p. 257.

M. S. Bently: "In 1882 it was a street the same as the others. * * * People did not drive wherever they chose along the track. There was a marked street there. South of the track and north of the track and north of the lot line."

Record, p. 262; p. 264.

Rufus Merriam: "During that period (1888) the street was pretty generally used from Lincoln or Mon-

roe on the west to Stevens on the east. * * * * When I first came here there was a great deal of travel longitudinally with the track on Railroad street. Since the fire there has not been so much travel there."

Record, p. 266; p. 267.

D. M. Drumheller: "As to the condition of Railroad street from the time it was platted to 1889, practically all the travel and traffic from the main part of town went down Howard Street to the track and then down Railroad Street to the Depot backwards and forwards. * * * As far as I know the general understanding was that Railroad Street was a street. It was always considered a street. * * * People having buildings on Railroad Street used the street to get to and from their buildings. People living south of the track and further west also used the track to get down to the neighborhood of their own buildings."

Record, p. 269; p. 270; p. 271.

J. B. Blalock: "It was used by the public generally as a highway up till 1889 and was built on from Monroe pretty much up to Howard Street, probably five or six blocks I should think. * * * The general understanding and report in the city as to Railroad Street was that it was a street the same as any other. There was lots of travel on it, there was business there. * * * Riverside Avenue and Howard Street were of more importance; I don't think that Main was of as much importance as Railroad Street, nor Front. * * * By the importance of a street

I mean the amount of teams and vehicles and traffic that went over it."

Record, p. 271; p. 272.

Thomas Thwaite: "They all used the street, it was a street then (1886). * * * The street was generally used from Stevens to Jefferson Street."

Record, p. 273; p. 274.

George Turner: "The street was then (1884) being used by the public as a street, that use and the condition of the buildings on the street continued up until 1889, at the time of the fire. * * Railroad Street was then used by the public as a thoroughfare as well for reaching the Depot, which was down on Post Street, as in reaching these buildings on each side of the street, for the purpose of ingress and egress, and also for the passage of vehicles east and west off Railroad Street. * * * I could not identify the particular point where the traffic commenced or ended on the street, but I will say, generally, from about Stevens Street on the east to Lincoln Street on the west."

Record, p. 275.

C. J. Craig: "From 1882 to 1889 the street was generally used as a street, that was principally used by people coming from Brown's Addition into the city here. I used it nearly altogether then. I could come up Railroad Street and then take a cross street to go down town. I used to see the other residents coming that way frequently. * * * We didn't use

Railroad Street much after the fire. The whole city was burned up and we travelled most any way."

H. A. Holland: "I recall the condition of Railroad Street between 1881 and 1889. It was used by the public generally as a street. * * * The street was travelled east as far as Stevens and west to Monroe. * * * The street it still open on the south side, in front of our property, except the railroad track."

Record, p. 288.

This testimony could have been augmented indefinitely, if it had been anticipated that any question would be made, but the admission of Mr. Graves, leading Counsel for respondent at the trial, seemed to make it unnecessary. Even without that admission, it would hardly have been proper for complainant to duplicate its testimony indefinitely. The Court will see that the witnesses who were sworn were among the oldest and best citizens of Spokane, and in view of the uniformity of their testimony as to the nature and character of the travel and traffic on Railroad Street, it is impossible to doubt that Railroad Street was a well travelled street, a distinctive street, as much a street as any other street in the city from the time of the making the town plat down, at least, to the great fire of August 4, 1889. When to all this is added the character of the improvements on the street, the conduct of the Railroad Company in inviting and promoting that improvement, throughout the entire time, the testimony showing the origin of the street to have

grown out of the agreement of General Sprague and Mr. Browne, and the testimony showing the entire absence at any time of an assertion of an exclusive right by the Railroad Company, it is impossible, we respectfully submit, for this Court to reach any other conclusion than that the Railroad Company intended to and did dedicate Railroad Street, to the use of the public, and that the use of the street by the public was so full, perfect and complete that it constituted an acceptance by the public of the dedication. We are speaking now of a common law dedication. Of course if the statutory dedication was complete the question of common law dedication is immaterial, and we believe that it was complete; but we have sought to make assurance doubly sure, by establishing at the same time a complete common law dedication. Instead of the promissive use of the street, gradually withdrawn as the necessities of the Railroad required, pictured by respondent, we have shown a use so full, perfect and complete in every way, and extending for such a length of time, and, marked with such evidences of acquiescence, not in a permissive use but in an established lawful use, that unless all inferences from human conduct are to be discarded, Railroad Street had become established as a street at the time of the great fire in 1889.

The respondent was permitted to introduce the evidence found in the record, concerning the progressive use of Railroad Street for warehouse purposes, made tentatively at first and confidently and aggressively at

a later period, on the theory that it went to the question of the intent of the Railroad Company in the matter of the dedication of the street; but we submit that it throws no light on that question, and that, since there is no question of estoppel, abandonment or adverse use in the case, its reception was improper for any purpose. In considering the question of common-law dedication there must be some point of time to which the Courts can refer and say the dedication was or was not complete at that time. The conduct of the parties after that time, and particularly the conduct of the dedicator in attempting to resume his dominion over the street, cannot be permitted to influence the rights of the public. The authorities to this proposition were collected and discussed by Mr. Elliott in his work on Roads and Streets, cited in our principal brief. Now we say that Railroad street became a street by the conduct of the Railroad Company and the public, if not before, at least by the time of the great fire of 1889, and we admit that if it had not then become a street it never has been a street. Therefore it is wholly immaterial what view the Railroad Company and the municipal authorities acted on after that time. If the street was then a street it could not be lawfully resumed by the Railroad Company, and the rights of the publis in it could not be surrendered by the city. And we assume as a proposition that needs no authority, that the city could not do by inaction or indirection what it could not do affirmatively and directly. Its silence during the period of encroachment by the Railroad Company could not

confer rights in the street after it had become a street, nor could its action in taxing the right of way either generally or by local assessment, have that effect. Such conduct of the public authorities during the period when the alleged dedication was ripening would of course be competent evidence on the question of dedication or no dedication, but after the street had become fixed as a street, it was immaterial for any purpose.

The respondent has naturally made much of the supine conduct of the municipal authorities in permitting the street to be obstructed to the extent that the evidence shows it to be obstructed at the present time, but the Court cannot, consistently with the law, give any effect to that conduct; and when it remembers the influence of a great trans-continental railroad, exerted, not only over municipal authorities, but over business men applying for and receiving its favors, the men interested in acquiring the abutting lots on its right of way in order that they might receive its favors, it cannot greatly wonder that the Railway Company has thus far gone on victoriously in the course marked out by it.

This brings us to the thought shadowed forth in various parts of respondent's brief, but never laid down anywhere as a distinct bar to relief here, that these complainants, abutting owners, are in some way estopped by not having sooner complained.

We say in respect to that that if respondent desired to estop the complainants it should have pleaded estoppel and thereby given them an opportunity to rebut any inferences arising against them from the encroachments of the Railroad Company shown by the evidence.

We say further that there is no principal of law that can be invoked to make an encroachment in a part of a public street an estoppel against abutting owners to complain of further and additional encroachments.

Moreover, as to three out of the four complainants here, their property is on the south side of the street. There never has been any encroachment on that side, and the street has ever been an open street on that side one hundred and twenty-five feet wide. They have never before been hurt and have never before had occasion to complain. Now however it is proposed to take away street access to their property and to darken the ground floor of their buildings by a structure higher than their second story windows and approaching the front of their property within a few feet. We say on these facts that they have not been remiss in not before complaining, and that there is nothing in their conduct which requires a Court of Equity to deny them its aid in the protection of their clear legal rights?

We do not deem it necessary to notice the authori-

ties referred to by respondent and going to the question of the requisites of a common law dedication. The vital principle underlying all dedications is the intent to dedicate, and where that intent is to be made out by conduct the inferences from the conduct must be clear and convincing, and will not be aided by presumption; and there must be an acceptance by the public, and where that acceptance is to be made out from user the like certainty as to the acceptance must flow as a necessary inference from the user. No authority can or does state the law more strongly against us. We accept it as stated and are willing to have the question of the common law dedication of Railroad Street measured by it.

We will notice one or two minor points and then conclude this brief. Respondent introduced in evidence, and quotes in its brief and comments thereon, a part of a circular addressed to the public in 1908 against the attempt made in that year to secure the assent of the City Council to the dismemberment and disfigurement of the city by the building of a broad and high dirt fill through the center of the business district. That circular was written and signed, along with others, by one of the complainants herein who is also of Counsel in the case, and respondent says of it: "It is clearly apparent from the language used that Judge Turner no more supposed in 1908 than he did in 1892 that Railroad Street was a public highway but considered it on both such periods to be the private right of way of the Northern Pacific Railway Company."

This comment is made notwithstanding the explanation of the circular letter made by Judge Turner in his testimony and in the face of his declaration when on the witness stand that in a number of addresses made to the City Council in 1908 he clearly and explicitly and positively took the position that Railroad Street was not the private right of way of the Railway Company, but was one of the public streets of the City of Spokane. He did not, it is true, explain why this contention was not carried forward and embodied in a document addressed to the people from another standpoint and intended to influence many men of many interests. He was not asked to do so. The matter is not of any importance because what Judge Turner thought in 1908, if he thought as respondent suggests, cannot be the measure of the rights of complainants in this litigation. Judge Turner would like to have his opinions accepted as the measure of the rights of his clients, but unfortunately a somewhat extended experience with the Courts has disabused his mind of any such vain hope.

We cannot believe that Counsel for respondent are serious in the suggestion that there is any inconsistency between the position of complainants here and that of the city in the Mill Street litigation twenty years ago, and brought to this court under the title, "The Northern Pacific Railroad Company vs. the City of Spokane." That was an action brought by the Railroad Company to enjoin the City from tearing down a temporary freight depot built in Railroad Street and across Mill Street. The city might have taken the position in that

case that the depot building was an obstruction in Railroad Street as well as a closing of Mill Street, although to have done so would have been to raise unnecessary and, what counsel may have then thought, troublesome issues. The city chose to stand on the closing of Mill Street. In doing so it admitted neither expressly nor impliedly, neither as matter of fact nor as matter of law, that Railroad Street was not one of the established streets of the city. The matter is draggged into this case by the hair of the head, because none of the complainants here were parties to that action and no plea of res-judicata is made even if they had been parties. The purpose apparently was to have a little more fun with Judge Turner by again convicting him of supposed inconsistency on the strength of that case. Well all we have to say about that is, that if respondent can get any fun out of Northern Pacific Railroad Company vs. the City of Spokane, its cheerful optimism is unbounded, and worthy a better result than it is likely to receive at the hands of the Court that rendered the decision in that case.

This reply brief, while not provided for by the rules of this Court, has been prepared pursuant to an understanding with counsel for respondent, that complainants would prepare and serve their original brief in advance of the time fixed by the rules of the

Court, and that respondent would then prepare and serve its brief in time to enable complainants to prepare and serve a reply brief.

Respectfully submitted,

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POST, AVERY & HIGGINS,
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